

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CYNTHIA E. ALFORD,	)	
	)	No. CV-05-166-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DIRECTING ENTRY OF
JO ANNE B. BARNHART,	)	JUDGMENT FOR DEFENDANT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 16, 19), submitted for disposition without oral argument on February 6, 2006. Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Daphne Banay represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff, born June 24, 1953, was 49-years-old at the time of the administrative hearing. She was 5'4" tall and weighed 220 pounds. (Tr. at 550-551.) She previously filed an application for disability benefits, which was denied by the ALJ on March 21, 2001.

1 There was no appeal or request to reopen that decision. Plaintiff  
2 then filed an application for Supplemental Security Income benefits  
3 on April 24, 2001, alleging disability as of October 15, 1997, due  
4 to leg and heart problems. (Tr. at 406-412.) Plaintiff had a high  
5 school education and past relevant work as a salad maker,  
6 secretary, telemarketer, hotel maid, switchboard operator, and other  
7 short term, temporary jobs. Following a denial of benefits at the  
8 initial stage and on reconsideration, a hearing was held before  
9 Administrative Law Judge Paul Gaughen (ALJ). In 2003, the ALJ  
10 denied benefits; review was denied by the Appeals Council. This  
11 appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C.  
12 § 405(g).

#### 13 ADMINISTRATIVE DECISION

14 The ALJ concluded Plaintiff had not engaged in substantial  
15 gainful activity and suffered from severe impairments, but those did  
16 not meet the Listings. (Tr. at 359.) Her impairments included mild  
17 aortic regurgitation, obesity and osteoarthritis/degenerative joint  
18 disease of the knees and lumbar spine. Plaintiff's testimony was  
19 not found fully credible. The ALJ found she had a residual capacity  
20 for light work with occasional climbing of ramp/stairs, balancing,  
21 kneeling, crouching, crawling, or stooping, and no climbing of  
22 ladder/rope/scaffolds or work around hazards. Plaintiff was not  
23 found to be precluded from performing her past relevant work as a  
24 secretary, accounts payable clerk, or switchboard operator. (Tr.  
25 at 359.) The ALJ concluded Plaintiff was not disabled.

#### 26 ISSUES

27 The question presented is whether there was substantial  
28 evidence to support the ALJ's decision denying benefits and, if so,

1 whether that decision was based on proper legal standards.  
2 Plaintiff contends the ALJ erred when he (1) concluded Plaintiff's  
3 mental impairments were non-severe, (2) concluded she had the  
4 residual capacity to perform a full range of light work, and (3)  
5 relied on the opinion of the consulting physician.

#### 6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
8 court set out the standard of review:

9 The decision of the Commissioner may be reversed only if  
10 it is not supported by substantial evidence or if it is  
11 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
12 1097 (9th Cir. 1999). Substantial evidence is defined as  
13 being more than a mere scintilla, but less than a  
14 preponderance. *Id.* at 1098. Put another way, substantial  
15 evidence is such relevant evidence as a reasonable mind  
16 might accept as adequate to support a conclusion.  
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
18 evidence is susceptible to more than one rational  
19 interpretation, the court may not substitute its judgment  
20 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
21 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599  
(9th Cir. 1999).

22 The ALJ is responsible for determining credibility,  
23 resolving conflicts in medical testimony, and resolving  
24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
25 Cir. 1995). The ALJ's determinations of law are reviewed  
26 *de novo*, although deference is owed to a reasonable  
27 construction of the applicable statutes. *McNatt v. Apfel*,  
28 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are  
25 "under a disability" are eligible to receive benefits. 42  
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
27 medically determinable physical or mental impairment"  
28 which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological

1 abnormalities which are demonstrable by medically  
 2 acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a  
 3 claimant will be eligible for benefits only if his  
 4 impairments "are of such severity that he is not only  
 5 unable to do his previous work but cannot, considering his  
 6 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy . . . ." 42 U.S.C. § 423(d)(2)(A).  
 Thus, the definition of disability consists of both  
 medical and vocational components.

7 In evaluating whether a claimant suffers from a  
 8 disability, an ALJ must apply a five-step sequential  
 9 inquiry addressing both components of the definition,  
 10 until a question is answered affirmatively or negatively  
 11 in such a way that an ultimate determination can be made.  
 12 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 13 claimant bears the burden of proving that [s]he is  
 14 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 15 1999). This requires the presentation of "complete and  
 16 detailed objective medical reports of h[is] condition from  
 17 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 18 404.1512(a)-(b), 404.1513(d)).

## 14 ANALYSIS

### 15 1. Severe Impairment

16 Plaintiff contends the ALJ erred when he rejected Dr. Pollack's  
 17 opinion which included several limitations. Dr. Pollack diagnosed  
 18 somatoform disorder with the following moderate functional  
 19 limitations: (1) maintaining attention and concentration for  
 20 extended periods; (2) completing a normal workday or work week; (3)  
 21 interacting appropriately with the public; (4) accepting  
 22 instructions and responding appropriately to criticism from  
 23 supervisors; (5) maintaining socially appropriate behavior; and (6)  
 24 adhering to basic standards of neatness and cleanliness. Defendant  
 25 responds the ALJ correctly relied on the findings of examining  
 26 physician Dr. Toews, who concluded Plaintiff would have only slight  
 27 limitations with the possibility of malingering. He also noted "she  
 28 had no difficulty remembering simple instructions and was probably

1 able to remember detailed" as well, had normal attention and  
2 concentration and working memory, and presented as an "open,  
3 gregarious individual" who "would have no difficulty relating to co-  
4 workers or tolerating supervision." (Tr. at 356.)

5 At step two of the sequential process, the ALJ must conclude  
6 whether Plaintiff suffers from a "severe" impairment, one which has  
7 more than a slight effect on the claimant's ability to work. To  
8 satisfy step two's requirement of a severe impairment, the claimant  
9 must prove the existence of a physical or mental impairment by  
10 providing medical evidence consisting of signs, symptoms, and  
11 laboratory findings; the claimant's own statement of symptoms alone  
12 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms  
13 must be evaluated on the basis of a medically determinable  
14 impairment which can be shown to be the cause of the symptoms. 20  
15 C.F.R. § 416.929. Once medical evidence of an underlying impairment  
16 has been shown, medical findings are not required to support the  
17 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345  
18 (9th Cir. 1991). However, an overly stringent application of the  
19 severity requirement violates the statute by denying benefits to  
20 claimants who do meet the statutory definition of disabled. *Corrao*  
21 *v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the  
22 Commissioner has passed regulations which guide dismissal of claims  
23 at step two. Those regulations state an impairment may be found to  
24 be not severe *only* when evidence establishes a "slight abnormality"  
25 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,  
26 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ  
27 must consider the combined effect of all of the claimant's  
28 impairments on the ability to function, without regard to whether

1 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)  
2 (Supp. III 1991). The step two inquiry is a *de minimis* screening  
3 device to dispose of groundless or frivolous claims. *Bowen v.*  
4 *Yuckert*, 482 U.S. 137, 153-154.

5 In addressing Dr. Pollack's opinion, the ALJ noted:

6 The undersigned notes that the claimant has been diagnosed  
7 as suffering from a somatoform disorder. However, after  
8 consideration of the medical record, the undersigned  
9 concludes that the claimant suffers from no severe,  
10 medically determinable mental impairment, which imposes or  
11 has imposed more than slight limitations on her ability to  
12 perform work-related activities and/or has not lasted in  
13 severity for any continuous 12-month period.

14 In making this determination, the undersigned notes that  
15 although Dr. Pollack diagnosed the claimant with a  
16 somatoform disorder with some moderate functional mental  
17 limitations, treating and examining physicians have noted  
18 no unusual pain or pain-related behavior and as put forth  
19 in Dr. Toews report, would argue against such a diagnosis.  
20 The moderate functional mental limitations found by Dr.  
21 Pollack [noted above] ... are simply not supported by the  
22 overall medical evidence of record.

23 The undersigned assigns diminished weight to Dr. Pollack's  
24 analysis. Dr. Pollack opined that the claimant had  
25 revealed a preoccupation with physical complaints and a  
26 propensity of antisocial behaviors and while she might  
27 have antisocial impulses, that she was inclined to  
28 associate with others who acted out inappropriately and  
29 that her behavior could also be called inappropriate with  
30 him noting she had some rather unusual behaviors. In  
31 contrast to these observations and the aforementioned  
32 moderate mental limitations set forth by Dr. pollack, the  
33 undersigned first notes that the extensive examination by  
34 Dr. Toews revealed the claimant presented very differently  
35 than she tested, with good recall during the interview;  
36 easy and ready interaction; and anxiety and depression  
37 free (which would be unusual if one had memory deficits  
38 and perhaps some cognitive losses). Dr. Pollack also  
39 reported she had no difficulty remembering simple  
40 instructions and was probably able to remember detailed  
41 instructions; normal attention and concentration; normal  
42 working memory and that she presented as a rather open,  
43 gregarious individual that would have no difficulty  
44 relating to co-workers or tolerating supervision.

45 (Tr. at 356.) Additionally, the ALJ noted Plaintiff's report of  
46 daily activities (drives, balances a checkbook and pays bills, has

1 a number of friends she sees on a regular basis, gets along with  
2 people in general, enjoys movies, plays the guitar, sings, and goes  
3 camping (Tr. at 525)) was inconsistent with severe mental  
4 limitations as was the fact she had not sought or received any  
5 mental health treatment or used medication. (Tr. at 357.)

6 Neither Dr. Pollack nor Dr. Toews provided treatment; thus, for  
7 purposes of this analysis both are considered examining physicians.  
8 Dr. Pollack administered the WAIS-III and MMPI-2. (Tr. at 511.)  
9 Dr. Pollack tested Plaintiff's full scale IQ at 87, low average  
10 intelligence. (Tr. at 513.) Her MMPI scores were valid with  
11 elevated L and K scores indicative of attempting to present herself  
12 in a most favorable light; the scores also reflected she was  
13 guarded, defensive and prone to act out inappropriately or through  
14 others who acted inappropriately. (Tr. at 514.) He concluded  
15 Plaintiff suffered from somatoform disorder, with several moderate  
16 limitations. (Tr. at 516-517.)

17 Dr. Toews administered a mental status examination, WMS-III,  
18 Trails A and B and Test of Memory Malingered. (Tr. at 534.) He  
19 noted that Plaintiff presented very differently than as tested. Dr.  
20 Toews diagnosed rule/out malingering, possible somatization disorder  
21 and possible histrionic and passive-aggressive personality traits.  
22 Her GAF was assessed at 75, indicative of only slight limitations.  
23 (Tr. at 538-540.) DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH  
24 EDITION (DSM-IV), at 32 (1995).

25 When there is a conflict in the medical findings, the ALJ is  
26 responsible for resolving the conflict. *Morgan v. Comm'r of the*  
27 *Soc. Sec. Admin.*, 169 F.3d 595, 603 (9<sup>th</sup> Cir. 1999). When a  
28 physician relies on "independent clinical findings" in formulating



1 a medical opinion, that opinion may be credited by the ALJ. *Andrews*  
2 *v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *Magallanes v. Bowen*,  
3 881 F.2d 747, 751 (9th Cir. 1989). In the absence of independent  
4 clinical findings, an opinion of an examining physician may be  
5 disregarded only after setting forth specific, legitimate reasons  
6 based on substantial evidence in the record. *Magallanes*, 881 F.2d  
7 at 751 (citation and internal quotation marks omitted). Here, the  
8 ALJ resolved the conflict between the differing opinions, choosing  
9 to credit that of Dr. Toews. Not only were there independent  
10 clinical findings to support that opinion, but the ALJ gave  
11 specific, legitimate reasons for doing so, including a list of  
12 inconsistent daily activities (Tr. at 525) and failure to  
13 participate in mental health treatment or counseling. These are  
14 legitimate reasons for rejecting a medical opinion. *Rollins v.*  
15 *Massanari*, 261 F.3d 853, 856 (9<sup>th</sup> Cir. 2001). There was no error in  
16 concluding Plaintiff's mental impairment was non-severe.

17 **2. Consulting Physician / Residual Physical Capacity**

18 Plaintiff contends the ALJ erred when he concluded she could  
19 perform a full range of light work, with occasional postural  
20 limitations and no work around heights or hazardous machinery.  
21 Plaintiff argues this conclusion was based on the opinion of  
22 consultant Dr. Diane L. Rubin, who examined Plaintiff on only one  
23 occasion, in contrast to treating physician, Dr. David Hurley, who  
24 concluded Plaintiff was severely limited due to coronary artery  
25 disease, hyperlipidemia and hypothyroidism. (Tr. at 479.)

26 In a disability proceeding, the treating physician's opinion is  
27 given special weight because of his familiarity with the claimant  
28 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05



(9th Cir. 1989). If the treating physician's opinions are not contradicted, they can be rejected only with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons that are supported by substantial evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating physician's uncontradicted medical opinion will not receive "controlling weight" unless it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques," Social Security Ruling 96-2p, it can nonetheless be rejected only for "'clear and convincing' reasons supported by substantial evidence in the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). Furthermore, a treating physician's opinion "on the ultimate issue of disability" must itself be credited if uncontroverted and supported by medically accepted diagnostic techniques unless it is rejected with clear and convincing reasons. *Holohan*, 246 F.3d at 1202-03. Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical findings to support a doctor's report based substantially on a claimant's subjective complaints of pain, as specific, legitimate reasons for disregarding the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

In his opinion, the ALJ noted

Although Dr. Hurley found the claimant severely limited on

1 May 9, 2002 due to coronary artery disease;  
2 hyperlipidemia; and history of hypothyroidism on a  
3 Physical Evaluation form, the undersigned notes this form  
4 is shown to be (from the face of the document) a report  
5 compiled for public assistance eligibility purposes for  
6 use by the Department of Social and Health Services. The  
7 report's findings are not supported by reference to  
8 standardized testing or by the claimant's treating  
9 cardiologist who has recommended prophylactic medication  
10 and yearly follow-up evaluations only, with no functional  
11 limitations assessed by him.

12 The findings at Exhibit B5F [completed by Dr. Hurley] are  
13 also not supported by, or consistent with, the more  
14 detailed report of consultative examination at Exhibit  
15 B11F [completed by Dr. Rubin]. The latter report is  
16 supported by findings from a clinical interview and  
17 standardized testing for orthopedic and other possible  
18 impairments and accordingly, these findings are afforded  
19 greater weight.

20 (Tr. at 357, references to some exhibits omitted.) As noted by the  
21 ALJ and confirmed by her treating cardiologist, Plaintiff's post-  
22 operative coronary artery disease did not present any limitations  
23 and the only recommendation was follow-up on an annual basis.  
24 Additionally, it appears from Dr. Hurley's clinical notes, that the  
25 hyperlipidemia and hypothyroidism were well controlled with  
26 medication. (Tr. at 489, 490, 504.) Moreover, Dr. Hurley's RFC was  
27 not supported by clinical findings. Plaintiff did not report any  
28 difficulty walking or standing because of the post-operative knee  
impairment. (Tr. at 524.) Frequent urinary urges were controlled  
with medication. (Tr. at 524.) Dr. Rubin's examination revealed  
normal reflexes, range of motion, muscle strength, grip strength,  
gross and fine manipulation. Only an inability to perform a full  
squat was observed due to poor balance. (Tr. at 526.) Finally, Dr.  
Rubin's assessment of light work capability was supported by other  
RFC forms in the record and Plaintiff's report of daily activities.  
(Tr. at 461, 473, 525.) Finally, Plaintiff reported she did not

1 engage in work after 1986 because of "boyfriends." (Tr. at 525.)  
2 The ALJ did not err in assessing Plaintiff's residual capacity to be  
3 one capable of light work with some postural limitations. (Tr. at  
4 358.) Accordingly,

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is  
7 **DENIED.**

8 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
9 **Rec. 19**) is **GRANTED**; Plaintiff's Complaint and claims are **DISMISSED**  
10 **WITH PREJUDICE.**

11 3. The District Court Executive is directed to file this Order  
12 and provide a copy to counsel for Plaintiff and Defendant. The file  
13 shall be **CLOSED** and judgment entered for Defendant.

14 DATED February 9, 2006.

15  
16 S/ CYNTHIA IMBROGNO  
17 UNITED STATES MAGISTRATE JUDGE  
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